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Res Ipsa Loquitur -- Application to Electric Eye Doors

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Res Ipsa Loquitur—Application to Electric Eye Doors

The recent North Carolina case of *Watkins* v. *Taylor Furnishing Co., Inc.*,[1] held that the doctrine of *res ipsa loquitur* did not apply where a customer was injured by a "magic eye" door in defendant's store. Plaintiff entered through the left side of the double door opening, the door, being partially open, suddenly closed catching the plaintiff between it and the door frame. The applicability of *res ipsa loquitur* to injuries sustained by customers in stores is raised by this case and the following discussion will be limited to such problem.

A storekeeper owes an affirmative duty to exercise ordinary and reasonable care to maintain the premises in a safe condition for the protection of business visitors.[2] In the absence of the proprietor's actual knowledge of the alleged defect, it must appear that he was constructively notified of its presence, *i.e.*, that it existed for such a time before the accident as to have become apparent if reasonable care had been exercised in inspecting the premises.[3] Such a failure to inspect, or a failure to repair discoverable defects, constitutes negligence. On the other hand, the defendant storekeeper is not the insurer of the safety of those who enter his store for the purpose of making purchases.[4]

As prerequisite to the invocation of the doctrine of *res ipsa loquitur* the courts have established the following rules: (1) The instrumentality producing harm must be such that in the ordinary course of events no injury would result unless from a negligent construction or user.[5] (2) The apparatus must have been in the control and/or management of the party charged with neglect at the time of the injury.[6] It has been held that this refers to the right of control, rather than actual control, at the time of the negligence complained of.[7] Thus the mere

[1] 224 N. C. 674, 31 S. E. (2d) 917 (1944).

[2] Todd v. S. S. Kresge Co., 303 Ill. App. 89, 24 N. E. (2d) 899 (1940); Sherlock v. Strouss-Hirshberg Co., 132 Ohio St. 35, 4 N. E. (2d) 912 (1936).

[3] Rankin v. Brandies & Sons, 135 Neb. 86, 280 N. W. 260 (1938); Pratt v. Great Atl. & Pac. Tea Co., 218 N. C. 732, 12 S. E. (2d) 242 (1940).

[4] Hulett v. Great Atl. & Pac. Tea Co., 299 Mich. 59, 299 N. W. 807 (1941); Pratt v. Great Atl. & Pac. Tea Co., 218 N. C. 732, 12 S. E. (2d) 242 (1940); Fox v. Great Atl. & Pac. Tea Co., 209 N. C. 115, 182 S. E. 662 (1935); Sherlock v. Strouss-Hirshberg Co., 132 Ohio St. 35, 4 N. E. (2d) 912 (1936).

[5] John v. McGinnis Co., 37 Cal. App. 176, 99 P. (2d) 323 (1940); Wiedanz v. May Dept. Store Co., —— Mo. App. ——, 156 S. W. (2d) 44 (1941); Springs v. Doll, 197 N. C. 240, 148 S. E. 251 (1929); Sherlock v. Strouss-Hirshberg Co., 132 Ohio St. 35, 4 N. E. (2d) 912 (1936); Kilgore v. Shepard Co., 52 R. I. 151, 158 Atl. 720 (1932).

[6] Olson v. Swan, 203 Cal. 206, 263 Pac. 518, 58 A. L. R. 129 (1928); Home Public Market v. Newrock, 111 Colo. 428, 142 P. (2d) 272 (1943); Todd v. S. S. Kresge Co., 303 Ill. App. 89, 24 N. E. (2d) 899 (1940); Nichols v. Korbritz, 139 Me. 256, 29 A. (2d) 161 (1942); Wiedanz v. May Dept. Store Co., —— Mo. App. ——, 156 S. W. (2d) 44 (1941); Springs v. Doll, 197 N. C. 240, 148 S. E. 251 (1929); Benjamin v. Sears, Roebuck Co., 62 Ohio App. 83, 23 N. E. (2d) 447 (1939); Sherlock v. Strouss-Hirshberg Co., 132 Ohio St. 35, 4 N. E. (2d) 912 (1936).

[7] Hart v. Emery, Bird, Thayer Dry Goods Co., 233 Mo. App. 312, 118 S. W. (2d) 509 (1938).

possibility that some third person might have been responsible for the negligent condition does not prevent the rule from applying, because the doctrine is founded on probabilities, not mere possibilities.[8] In most of the cases both of these requisites are present, but courts apply the doctrine when only one is found to exist. In combination with one or both of these conditions is found a third explanation for the application of *res ipsa loquitur:* That the defendant possesses superior knowledge or means of information as to the cause of the occurrence than does the plaintiff.[9]

The doctrine is not a substantive rule of law; rather, it is a rule of evidence, permitting the jury, in most jurisdictions, to draw an inference of negligence, which the defendant is always entitled to negative, and if he fails to do so takes the risk of an adverse verdict.[10] If two reasonable inferences are deducible from the same facts, one of which points to the negligence of the defendant and another to a different cause, the doctrine is inapplicable, else, it is said, "a jury is called upon to enter the field of speculation."[11]

The courts agree that the mere fact of an invitee falling on the floor of a store does not of itself raise the inference of negligence on the part of the storekeeper.[12*] To recover in such instance the injured party must prove by competent evidence some actionable negligence of

[8] *Ibid.*

[9] Takashi Kataoka *et al.* v. May Dept. Store Co., *et al.*, —— Cal. App. ——, 139 P. (2d) 25 (1943); Wiedanz v. May Dept. Store Co., —— Mo. App. ——, 156 S. W. (2d) 44 (1941).

[10] Galbraith v. Smith, 120 N. J. L. 515, 1 A. (2d) 34 (1938); Sherlock v. Strouss-Hirshberg Co., 132 Ohio St. 35, 4 N. E. (2d) 912 (1936).

[11] Farina v. First Nat. Bk., 72 Ohio App. 109, 51 N. E. (2d) 36 (1943) (The doctrine only applies when the facts admit of a single inference—that the accident would not have happened unless the defendant had been negligent).

[12*] F. W. Woolworth Co. v. Ney, 239 Ala. 233, 194 So. 667 (1940) (Plaintiff slipped on banana peel in aisle of store. Held: The Plaintiff is under the primary duty to show that the injury was proximately caused by the negligence of the storekeeper, or one of its servants or employees.); Dalton v. Steiden Stores, Inc., 277 Ky. 179, 126 S. W. (2d) 155 (1939) (Plaintiff stumbled over weather stripping and fell. Held: Must show that defect could have been discovered by reasonable inspection.); Hulett v. Great Atl. & Pac. Tea Co., 299 Mich. 59, 299 N. W. 807 (1941) (Plaintiff slipped on oily floor. Held: To establish liability there must be evidence that the floor was improperly oiled.); Rankin v. Brandies & Sons, 135 Neb. 70, 280 N. W. 260 (1938) (Plaintiff slipped on soapy substance on floor. Held: This raises no presumption of negligence, but what constitutes due care of the storekeeper should be determined from the surrounding circumstances.); Pratt v. Great Atl. & Pac. Tea Co., 218 N. C. 732, 12 S. E. (2d) 242 (1940) (Plaintiff slipped on greasy floor. Held: Defendant was not insurer of safety of those who entered the store and the doctrine of *res ipsa loquitur* is not applicable.); Fox v. Great Atl. & Pac. Tea Co., 209 N. C. 115, 182 S. E. 662 (1935) (Plaintiff slipped when she stepped on beet lying on the floor. Held: Must establish actionable negligence of the defendant.); Parker v. Great Atl. & Pac. Tea Co., 201 N. C. 691, 161 S. E. 209 (1931) (oily floor); Bowden v. S. H. Kress & Co., 198 N. C. 559, 152 S. E. 625 (1930) (oily floor); Reay v. Montgomery Ward & Co., Inc., 154 Pa. Super. 119, 35 A. (2d) 558 (1944) (oily floor); Martin v. Miller Bros. Co., 26 Tenn. App. 110, 168 S. W. (2d) 187 (1942). For further collection of authorities on this point see Notes (1919) 5 A. L. R. 282, (1924) 33 A. L. R. 181, 197.

the defendant.[13] Nor was the rule allowed to be extended to cover a case where the plaintiff stumbled over a plainly visible scale platform as she was leaving defendant's store,[14] or where plaintiff, busily engrossed in conversation with another lady, stumbled over a stool in the store's aisle,[15*] or where plaintiff was run into by a small boy on a tricycle, the store having tricycles for sale.[16*] Also refusing to allow the doctrine to be availed of where defendant's control is lacking, the California court in *Bartholomai* v. *Owl Drug Co. et al.* said: "The mere fact that the fire occurred is insufficient to raise an inference of negligence on the part of defendants."[17] In that case defendant was having some welding done by a contractor and fire broke out causing plaintiff's injuries.

There has been, however, some difference of opinion in applying the doctrine to those cases where a chair in which the customer is sitting suddenly collapses. In *Kilgore* v. *Shepard Co.*[18] it appeared that a leg of the chair in which plaintiff sat was out of its socket and suddenly collapsed. The Rhode Island court ruled that *res ipsa loquitur* did not apply, saying that the control over the chair had been assumed by the plaintiff.[19*] But the Missouri[20] and Texas[21] courts have repudiated the doctrine of the *Kilgore* case. Thus where a chair in which plaintiff sat collapsed, having been procured for her by a clerk of defendant, it was held that the customer had a *prima facie* case against the store.[22*] Likewise in the case of *Clark-Daniels, Inc.* v. *Deathe et al.*[23*] it was held that *res ipsa loquitur* was in order where a chair in which plaintiff was sitting collapsed because of the absence of a vital screw. It is sub-

[13] *Ibid.*

[14] Burckhalter *et al.* v. F. W. Woolworth Co., 340 Pa. 300, 16 A. (2d) 716 (1941).

[15*] Sherlock v. Strouss-Hirshberg Co., 132 Ohio St. 35, 4 N. E. (2d) 912 (1936) (The court was of opinion that this stool was not within the exclusive control of defendant, and that it could have been placed in this position by some of the customers as easily as by an employee of defendant.).

[16*] Barnes v. J. C. Penny Co., 190 Wash. 633, 70 P. (2d) 311 (1937) (It is necessary for the injured party to prove that the instrumentality causing the injury was, at the time thereof, in the exclusive control of defendant.).

[17] 42 Cal. App. (2d) 38, 108 P. (2d) 36, 39 (1940).

[18] 52 R. I. 151, 158 Atl. 720 (1932).

[19*] *Accord,* Mineo v. Rand's Food Shops, Inc., —— Misc. ——, 32 N. Y. S. (2d) 23 (1941) (Court conceded that defendant was constructively in control of the chair, but said that there should be exclusive control. There was also the feeling on the part of the court that defendant had only limited opportunity for inspection.).

[20] Herries v. Bond Stores, 231 Mo. App. 1053, 84 S. W. (2d) 153 (1935).

[21] Clark-Daniels, Inc. v. Deathe *et al.,* 131 S. W. (2d) 1091 (Tex. Civ. App. 1939).

[22*] *Supra* note 19 (The court distinguishes between this and the *Kilgore* case, which was stated to be in a minority, in that the clerk in the former case *offered* the chair to plaintiff, while in the latter case there was no clerk present and the plaintiff moved the chair six inches and sat down.).

[23*] *Supra* note 20 (The court attempts to distinguish this from the *Kilgore* case by stating that in the former there was a defect not apparent to the casual observer, while in the latter such was not the case.).

mitted that the proposition expounded in the latter decisions is more reasonable, for the storekeeper has an "overall" control of chairs provided for his customers and he could have discovered any defects by reasonable inspection; whereas the injured customer was not in a position to inspect for hidden defects.

The application of the doctrine would seem to be clear in those cases involving injuries sustained by falling objects. It is usually held that *res ipsa loquitur* is available when the object is within the control of defendant and would likely not have fallen had there been due care exercised by the latter. Thus in *Benjamin* v. *Sears, Roebuck & Co.*[24] plaintiff was permitted to invoke the doctrine where he was injured by a falling advertising sign which had been resting on a narrow ledge over a stairway.[25*] Closely allied to this situation and presenting a striking analogy is the case of *Nichols* v. *Korbritz.*[26] There plaintiff, while standing in the center of the store, was struck in the eye by a meat hook which, for some unexplained reason, had traveled from an open refrigerator along a track on the ceiling extending into the center of the store. The court said that, since this instrumentality was within the control of the defendant and the injury would not likely have happened had the latter exercised due care, *res ipsa loquitur* applied.[27] Likewise where a customer falls through a defective trap door, not having been apprised of its presence,[28] or an unguarded cellar stairway,[29] the doctrine has found favor with the courts.

The principal case seems to be one of first impression, but upon analogy and comparison with the prerequisites for the application of the doctrine and with those cases which immediately follow dealing with swinging doors, it is apparent that the North Carolina court reached the logical result. In a recent Illinois case[30] the plaintiff's intestate was about to enter defendant's store through a swinging door which was partially open. When she came within one foot of the entrance the door swung towards her, and in an effort to ward off a certain collision therewith, she lost her balance and fell. The evidence tended to show that several other persons had preceded intestate and had gone through this same door, accounting for its being partially open at this time. It was held that *res ipsa loquitur* did not apply. This case is representative of those where the injured party or some third person in fact

[24] 62 Ohio App. 83, 23 N. E. (2d) 447 (1939).

[25*] *Accord,* Perry v. Stein *et al.,* —— Mo. App. ——, 63 S. W. (2d) 296 (1933) (Where a shelf in a store collapsed throwing canned goods on plaintiff.); Gailbraith v. Smith, 120 N. J. L. 515, 1 A. (2d) 34 (1938) (Chandelier fell on plaintiff.).

[26] 139 Me. 256, 29 A. (2d) 161 (1942).

[27] *Ibid.*

[28] John v. McGinnis Co., 37 Cal. App. (2d) 176, 99 P. (2d) 323 (1940).

[29] Lynch *et al.* v. Gatteguo, —— Misc. ——, 17 N. Y. S. (2d) 337 (1939).

[30] Todd v. S. S. Kresge Co., 303 Ill. App. 89, 24 N. E. (2d) 899 (1940).

had control of the agency, and the accident might have resulted from one of several causes, for some of which the defendant would not be liable.[31*] When a customer places himself within range of a swinging door, he subjects himself to the probability of being hit by it if someone has just passed through it. It would be unreasonable to conclude that the storekeeper was in exclusive control of such an instrumentality. The reasoning of these cases applies to the facts of the recent North Carolina case.[32] Could it be fairly said that the storekeeper in the instant case was in exclusive control of the opening and closing of the "magic eye" door, when such door is known to remain motionless until the light beam between the electric eyes (which cause the door to operate) is broken by an incoming or outgoing patron? The proposition expressed in the swinging door cases above, *i.e.*, that third persons are in control of the door rather than defendant, would seem to apply to cases of doors operated by the magic eye.

In the instant case a railing separated ingoing and outgoing customers. The right hand door was marked "IN" and there was a rope on the outside of the left hand door to indicate that it was not the entrance. The plaintiff's carelessness in not keeping to the right and using the door marked entrance presents an inference of negligence which would also preclude the application of the doctrine. It is submitted that the Supreme Court reached the correct result.

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Wills—Acts Constituting Election

In the recent case of *Perkins* v. *Isley*[1] testatrix devised all her property to defendant and appointed plaintiff as executor. Plaintiff was declared mentally incompetent, and defendant requested the clerk of court to appoint an administrator *c. t. a.* The administrator was ap-

[31*] Olson v. Swan, 203 Cal. 206, 263 Pac. 518, 58 A. L. R. 129 (1928) (The doctrine of *res ipsa loquitur* was not applicable in case of injury to a patron of a store by the rebound of a swinging door when she was holding its companion open for another customer to pass through, where the equipment is standard and includes checking devices.); Home Public Market v. Newrock, 111 Colo. 428, 142 P. (2d) 272 (1943) (Plaintiff was injured by the breaking of a glass panel in swinging door under pressure of his hand.); Wiedanz v. May Dept. Store Co., —— Mo. App. ——, 156 S. W. (2d) 44 (1941) (Where plaintiff, attempting to enter defendant's store through revolving door, was knocked down by a woman hit by the door which was pushed by a man, it was held that there was no proximate cause as to the defendant.); Farina v. First Nat. Bk., 72 Ohio App. 109, 51 N. E. (2d) 36 (1943) (Patron departing from bank was injured by collapse of revolving door. It was held that *res ipsa loquitur* did not apply.). *But cf.* Crump v. Montgomery Ward & Co., Inc., 313 Ill. App. 151, 39 N. E. (2d) 411 (1942) (The store's door was equipped with a plunger door check, and plaintiff was struck by the metal bar of the door which had been held open by the door stop but suddenly closed as customer entered the store. It was held that *res ipsa loquitur* was applicable.).

[32] *Supra* note 1.

[1] 224 N. C. 793, 32 S. E. (2d) 588 (1945).